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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEONARD L. LISIECKI,
Petitioner,

v.

FEDERAL HOME LOAN BANK BOARD and
MERIT SYSTEMS PROTECTION BOARD,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KEVIN M. GRILE
Staff Counsel
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO
446 North Central Avenue
Northfield, IL 60093
(312) 446-9486

MARK D. ROTH *
General Counsel
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700

* Counsel of Record

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-899

LEONARD L. LISIECKI,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

DECIDED: August 2, 1985

Before RICH and BENNETT, *Circuit Judges,* and MILLER, *Senior Circuit Judge.*

BENNETT, *Circuit Judge.*

Petitioner appeals the final decision of the Merit Systems Protection Board (MSPB or board), 23 M.S.P.R. 633 (1984), which reversed the initial decision of the presiding official, issued May 29, 1984, and sustained the action of the Federal Home Loan Bank Board (agency) in removing petitioner for unacceptable performance. We affirm.

BACKGROUND

This case presents a narrow but vitally important issue of statutory construction of first impression in this court, namely, whether the MSPB has the authority to review and mitigate the severity of reduction-in-grade (demo-

tion) or removal sanctions imposed by an employing agency in an action taken for unacceptable performance under 5 U.S.C. § 4303 (1982).[1] The board answered the question in the negative in this case arising from facts summarized as follows.

Petitioner Lisiecki became a career employee with his agency in 1972. Eventually, he became a savings and loan examiner, GS-11, and held that position until he was removed on January 7, 1984. His duty station was in Cleveland, Ohio.

Lisiecki's supervisor evaluated his performance in 1983 and found him deficient in "critical element 6." This element required examiners to develop final reports and documents in compliance with an agency manual to facilitate supervisory action. Mr. Lisiecki was then placed on a corrective work plan for 180 days. At the end of that period he was still considered unsatisfactory on element 6 and was given a warning notice of removal in accordance with 5 U.S.C. § 4303, based on unacceptable performance.[2] He was thereafter separated.

An appeal to the MSPB followed and a hearing was held before a presiding official who found that substantial evidence supported the rating of Mr. Lisiecki as unacceptable in critical job element 6. The presiding officer, however, citing *Douglas* v. *Veterans Administration*, 5 MSPB 313 (1981), held that the agency exceeded the tolerable limits of reasonableness in removing rather than demoting[3] Lisiecki, in view of certain circumstances

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[1] For convenience, 5 U.S.C. § 4303 (1982) is set forth in the Appendix.

[2] Unacceptable performance is defined in 5.U.S.C. § 4301(3) as "performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position." *See also* FPM 430-3 (1980).

[3] For brevity's sake the term "demote" will be used instead of the statutory term "reduction in grade." 5 U.S.C. § 4303(a), (b).

he considered as mitigating. His decision was that Lisiecki should have been demoted to GS-09 and he so ordered in reversing the agency removal action.

The agency filed a petition for review of the presiding official's decision alleging that the MSPB lacked the authority to review and mitigate penalties in actions taken under 5 U.S.C. § 4303 and that the board's decision in *Douglas* was no authority to the contrary. The board, by a 2-1 vote on October 22, 1984, agreed with the agency that it lacked this power, and on that basis, reversed its presiding official and sustained the agency's removal action. This appeal to the court seeks to overturn the final decision of the board and to obtain petitioner's reinstatement or reassignment to a GS-09 position as an examiner with his agency. In the alternative, it is requested that the case be remanded to the MSPB on the issue of whether the penalty approved by the board was too harsh in light of the presiding official's findings.

Whether the petitioner's performance was unacceptable in the position he held at the time of his removal is not now in issue. The presiding official found the performance was unacceptable and, on review, the board agreed. We do not disturb that finding. Petitioner had the right under section 1205 and 7701 of title 5 to appeal the agency action. On review, as an integral part of the appeal process, did MSPB have the right to mitigate the penalty imposed by the agency for the established unacceptable performance? In deciding this issue, it is not necessary to determine what standards would be applicable if the board had mitigation authority or whether, if it did have such authority, it could modify a removal in the manner petitioner seeks or mitigate by substituting a suspension or some other sanction. Finally, it is unnecessary to address any issues concerning whether petitioner should have been removed under title 5, chapter 75, for performance-based reasons because the provisions of that chapter were not invoked in this case. *See Lov-*

shin v. *Department of the Navy*, No. 84-1002 (Fed. Cir. June 21, 1985) (in banc).

The issue before the board on mitigation authority was not a simple one and it invited, by notice in the *Federal Register*, the filing of amici curiae briefs. Seventeen such briefs were filed by government agencies and departments and three unions of government employees. They also addressed other issues with which we are not concerned. The briefs of the Office of Personnel Management and most federal agencies contended that the board had no authority to mitigate penalties imposed pursuant to chapter 43, 5 U.S.C. § 4303, because to do so would frustrate congressional intent in the enactment of the Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5 U.S.C.). Further, it was argued that the board's opinion in *Douglas*, wherein it held that it had the authority to mitigate penalties imposed by agencies in chapter 75 actions for misconduct, does not extend to chapter 43 actions for performance appraisal. The three unions and two agencies contended just the opposite. With all of this help and after its own study of the matter, the board concluded, as noted, that its authority did not extend to mitigation under chapter 43.

The MSPB's concern with the difficulty and importance of the issue to be decided is understandable because the Reform Act is silent on it, and the legislative history does not address the issue explicitly. Nevertheless, the legislative history is highly instructive, sufficiently so as to support the board's result, which we affirm.

I

The Senate and House committee reports, the conference reports,[4] and the floor discussions demonstrate that

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[4] S. Rep. No. 969, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723; H.R. Conf. Rep. 1717, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 2860.

the Reform Act was the most comprehensive overhaul of the civil service since the (Pendleton) Civil Service Act in 1883. The Reform Act was the result of in-depth studies over many months.[5] This effort was necessitated by the fact that no systematic congressional review of the system had been attempted in almost a century and, with the great growth in the number of federal employees, many new problems had developed which demanded serious attention. We address here only one of those problems—the difficult, almost impossible, problem of discharging employees for poor performance. The patchwork of statutes, regulations, rules, and judicial restrictions built up over time had conspired, in effect, to tie the hands of the personnel managers. The "[i]nordinate procedural requirements and unreasonable standards" were condemned. S. Rep. No. 969, 95th Cong., 2d Sess. 40, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2762. The temptation was to keep an unsatisfactory worker on the payroll rather than go through the protracted hassle of discharging him, with no guarantee that the effort would be successful. This happened too often, and the public suffered. *Id.* at 1-4, U.S. Code Cong. & Ad. News at 2723-26; *see also* Remarks of Senator Abraham A. Ribicoff and Senator James R. Sasser, 124 Cong. Rec. 14,267, 14,281 (1978).

One of the devices in the Reform Act to accommodate the problem described was a new chapter 43 in title 5, entitled Performance Appraisal. New standards were authorized for evaluating performance with sanctions of removal or demotion for unacceptable performance. 5 U.S.C. §§ 4301-4308. While the authority of managers was strengthened, the Reform Act was careful to protect

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[5] In addition to congressional studies and extensive hearings, the President's Personnel Management Project made an exhaustive study involving "thousands of experts and members of the public." S. Rep. No. 969 on S. 2640 (which was passed), 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News at 2724.

the employees by due process procedures for notice, charges, opportunity to respond orally and in writing, representation by counsel or other representative, and a written appealable decision, among other things. *Id.* at § 4303. Any tension between the rights of employees and managers was resolved from the standpoint of the public's right to have competent, dedicated workers on its payroll for the promotion of "efficient and effective Government." S. Rep. No. 969 at 4, U.S. Code Cong. & Ad. News at 2726; 5 U.S.C. § 7101(b). Congress sought and achieved a balance between an agency's ability to take prompt action on the substance of an employee's performance on the one hand, and an employee's procedural protections on the other. *Id.* at 40, U.S. Code Cong. & Ad. News at 2762.

The House and Senate committee reports on the Reform Act are very similar in most of the respects material to the present case. The Senate bill, however, is the one that passed. For convenience, reference is made to some of the language in the Senate committee report to illustrate the concepts important here. The conference reports do not change the thrust of the Senate committee discussion of chapter 43 which follows. In its discussion of section 203, codified in 5 U.S.C. § 4303, the Senate report observed that entirely new procedures were being established for handling employees whose job performance failed to meet acceptable standards.

> One of the chief differences between the procedures currently applicable at the agency level and the proposed procedures concerns the standard governing the agency's action. Under current law, an employee may be dismissed for unacceptable performance only if dismissal would improve efficiency of the service. As a practical matter, agencies have found it very difficult to prove this to the degree required by courts through a series of judicial decisions. Section 4303(a) imposes a new standard. It is "per-

> formance which fails to meet established requirements in one or more critical elements of the job." The Committee intends that this new standard should not be governed by the existing case law defining the present standard, "such cause as will promote the efficiency of the service."[6]

S. Rep. No. 969 at 43, U.S. Code Cong. & Ad. News at 2765.

> The agency action cannot be ultimately upheld under any circumstances unless the agency first makes a prima facie case justifying its action. Once the agency meets this initial burden, the employee will be expected to introduce his own evidence, discredit the record made by the agency, or present whatever arguments he wishes. Following the submissions by both the employee and the agency, the Board will decide the case. At such point, the burden of persuasion, or the risk of nonpersuasion, will be on the employee.

Id. at 44, U.S. Code Cong. & Ad. News at 2766.

> Under this standard the Board must find that there is reasonable basis for the agency's decision whenever it concludes that a reasonable man could—on the basis of the record—have acted as the agency did, even if it is also possible to conclude that another course of action would also have been reasonable. In reviewing agency action taken under this section, both the Board and the courts should give deference to the judgment by each agency of the employee's performance in light of the agency's assessment of its own personnel needs and standards.

Id. at 45, U.S. Code Cong. & Ad. News at 2767.

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[6] The requirement that the adverse action promote the "efficiency of the service" originated with the Lloyd-La Follette Act, ch. 389, § 6, 37 Stat. 539 (1912).

In the discussion of appellate review, the report says that while due process procedures are intended by the Reform Act—

> [a]t the same time, they are intended to give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct, or whose work performance is unacceptable. Henceforth, the Board and the courts should only reverse agency actions under the new procedures where the employee's rights under this title have been substantially prejudiced.

Id. at 51, U.S. Code Cong. & Ad. News at 2773.

The Reform Act at 5 U.S.C. § 7701 permits an appeal to the board "from any action which is appealable to the Board under any law, rule, or regulation." It is provided in subsection (c)(1)(A) and (B) that the decision of the agency shall be sustained only if the agency's decision—

> (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.

Section 7701(c)(2) provides, however, that an agency decision may not be sustained if the employee shows harmful error in application of the agency's procedures in arriving at its decision, or shows the decision was based on a prohibited personnel practice, or that it was not in accordance with law.

The stated purpose of the Reform Act, however, was to give agencies greater ability and flexibility to remove or to discipline employees who engage in misconduct (chapter 75) or whose work performance is unacceptable (chapter 43). Stated another way, it was to "[a]llow

civil servants to be able to be hired and fired more easily, but for the right reasons." *Id.* at 4, U.S. Code Cong. & Ad. News at 2726; *see also Cornelius* v. *Nutt*, 53 U.S.L.W. 4837 (U.S. June 24, 1985.).

Senate Report No. 969 and House Conference Report No. 1717 explain that section 7701 gives a heavier burden of proof to the agency when it seeks to take an adverse action against an employee for misconduct than when the action is based on unacceptable performance. "However, it is intended that the overall effect of the new standards will be fewer reversals by the Board or the courts of adverse actions taken by the agencies." S. Rep.No. 969 at 55, 1978 U.S. Code Cong. & Ad. News at 2777. Addressing judicial review, the Senate report states:

> The Board's findings of fact shall be conclusive when supported by substantial evidence in the administrative record. In reviewing the Board's factual findings, the Court must determine whether the findings satisfy the particular standards of proof applicable to the agency action in question. Court review of the factual findings will be less vigorous therefore in the case of an action based on unacceptable performance . . . than an action based on misconduct . . . Likewise, agency actions should be reversed because the agency's procedures were in error only if the procedures followed substantially impaired the rights of the employees.

Id. at 64, U.S. Code Cong. & Ad. News at 2786.

Referring again to 5 U.S.C. § 7701(c)(1), which provides agencies with the lighter burden of "substantial evidence" in proving "unacceptable performance," to the presumptions expressed in legislative history in support of an agency's actions under chapter 43, and to rejection in chapter 43 actions of prior case law, we note that nevertheless an agency's action is not to be sus-

tained under three circumstances spelled out in section 7701(c)(2) as follows: "harmful error [7] in the application of the agency's procedures in arriving at such decision," a decision based on prohibited personnel practices as described in section 2302(b), or where the decision is contrary to law. Thus, management has a strengthened hand but the employee is protected from arbitrary or unlawful abuse.

It is impossible and unnecessary to summarize here all that Congress has said on the subject, but the foregoing brings into focus the main objectives it had. For the new chapter 43, Congress rejected out of hand the old chapter 75 procedures which had applied both to misconduct and to performance cases. Those procedures, tied as they were to the requirement to establish that an action against an employee must be for "the efficiency of the service," 5 U.S.C. §§ 7503, 7513, sometimes made the civil service a refuge for incompetent employees who, as a practical matter could not be discharged or demoted on account of the "inordinate," unrealistic maze of statutes, rules, regulations, and judicial restrictions. A new standard, "unacceptable performance" was proposed and adopted under chapter 43. If Congress had any intent that previously existing standards and procedures would carry over into chapter 43, there would have been little purpose in enacting it. The legislative history is explicit on this point. The dominant intent of chapter 43 was to "simplify and expedite procedures for dismissals of Federal employees whose performance is below the acceptable level within a comprehensive framework for performance evaluation." S. Rep. No. 969 at 10, U.S. Code Cong. & Ad. News at 2732. The legislative history repeatedly cautions that the old standards of review are

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[7] Harmful error is such error as might have caused the agency to reach a conclusion different from the one reached. *See Cornelius* v. *Nutt*, 53 U.S.L.W. at 4839 n.9, 4840 (citing 5 C.F.R. 1201.56(c)(3)) & n.11.

not applicable under chapter 43 and, as noted, that the MSPB and the courts should "give deference to the judgment by each agency of the employee's performance in light of the agency's assessment of its own personnel needs and standards." *Id.* at 45, U.S. Code Cong. & Ad. News at 2767.

II

Chapters 43 and 75 are silent on the subject of mitigation. It is argued, therefore, that it is inconsistent for the board to have found that Congress silently approved of board mitigation of penalties in chapter 75 actions while silently disapproving them under chapter 43. This is a specious argument when the legislative history is considered. That history instructs us that prior standards under chapter 75 and prior case law developed thereunder do not apply to the new chapter 43, that the latter's purposes are new and different, and that the deference due agency actions under the new chapter should mean fewer board reversals and less vigorous court review.

Chapter 43 gives to the agency discretion to select one of only two penalties, demotion or removal, for unacceptable employee performance. That discretion is not unfettered. It is measured by the mandated performance appraisal system, 5 U.S.C. §§ 4302, 4303; 5 C.F.R. §§ 430.201-.301, the requirement that substantial evidence support agency action, 5 U.S.C. § 7701(c)(1); 5 C.F.R. § 1201.56, and due process procedural protections of sections 4303 and 7701(c)(2). These limitations also mark the boundaries of board review. Why should this not be so? What institutional competence does the board or the court have to tell the hundreds of government agencies whether any of their approximately 3 million employees are performing acceptably? The legislative history speaks clearly of the deference due agency actions in this area in order to expedite the purposes of chapter 43 for the removal of poor performers with a minimum of red tape

in order to correct the historic evils in personnel practice so well articulated by congressional reports. Some deference is always due the interpretation of a statute by the agency entrusted with its administration. This is so even though the interpretation of the statute is not the only one which the court views as most reasonable. *Miller* v. *Youakin*, 440 U.S. 125, 144-45 n.25 (1979); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965); *Consumer Products Division, SCM Corp.* v. *Silver Reed America, Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985). Even so, courts are the final authorities on issues of statutory construction and we must reject an administrative construction inconsistent with statutory mandate or a policy Congress has sought to implement. *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). In this case, because the issue is new, we will carefully scrutinize the MSPB decision in light of the language and intent of the Civil Service Reform Act.

Chapter 43 was the centerpiece of the Reform Act. As the board stated in its opinion in this case: "Adoption of the substantial evidence standard and the elimination of the efficiency of the service requirement for Chapter 43 actions comprise the cornerstone of this new statutory scheme." 23 M.S.P.R. at 641. This conclusion is fully supported by the legislative history and the well-considered board opinion. We cannot agree with petitioner that these are minor differences or that a change in the burden of proof is the only difference from chapter 75. To so hold would gloss the new chapter with mitigation authority long exercised under chapter 75. Congress knew what to say if such was its desire. But, it did not so speak. Enactment of the two quoted basic changes gives a clear indication of congressional intent to restrict the board's authority in reviewing chapter 43 actions. Mitigation would add a third and more intrusive review

of agency action by the board. We decline to judicially legislate in this matter. The opening clause of section 4303(a) states: "Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance." *See* Appendix.

Surely, this suggests intent that additional procedural standards not identified, such as by judicial interpretation or by regulation or imposed by prior law, are not meant to be imposed on the agencies in section 4303 actions. *Wells* v. *Harris*, 1 M.S.P.R. 208, 225 n.35 (1979). Chapter 43 has procedural and substantive safeguards to protect employees from unfair or illegal treatment and they have been mentioned earlier. Congress did not include board authority to mitigate a penalty chosen by the agency, which is supported by substantial evidence and imposed according to its published regulatory procedures without harmful error.

Congress did identify two situations where an agency's authority to discipline an employee is limited to a demotion or reassignment. Both are outside chapter 43. One is in chapter 33, under which an employee who does not satisfactorily complete the probationary period for a supervisory or managerial position in which he has been placed, is entitled to be assigned to a position no lower than the one he left to accept the higher position for which he failed to qualify. *See* 5 U.S.C. 3321(b). *See also* 5 U.S.C. § 4303(f)(1); 5 C.F.R. § 315.907. The other situation arises under chapter 35 where it is provided that a career appointee in the Senior Executive Service (SES) who likewise fails to demonstrate fully successful executive performance is entitled to be placed in a position of equivalent tenure to the position occupied before appointment to the SES position. *See* 5 U.S.C. § 3594; 5 C.F.R. §§ 359.701, 359.702. Since these are the only statutory limitations on agency authority to remove an employee, it is reasonable to assume that they were the only mitigation steps that Congress intended for

unacceptable performance. We assume, without deciding, that the board could monitor enforcement of these statutory guarantees but this is really not mitigation according to its own discretion and is mentioned only to illustrate the care with which Congress refrained from extending to the board any mitigation authority to be exercised on its own initiative.

III

Since the MSPB held in *Douglas*, 5 MSPB 313, that it could mitigate penalties imposed for misconduct in chapter 75 proceedings, the question arises as to whether the reasoning in that case should be extended to chapter 43 actions for unacceptable performance. We do not think so.

It is important not to ignore the vital distinctions between the relevant chapters of title 5. In chapter 43 the basic issue to be decided is whether the employee has continued to perform unacceptably in a critical job element after being given an opportunity to improve. If he has failed, he can be demoted or removed by his agency. The action taken is remedial. The congressional purposes behind this straight-forward procedure have been discussed. Substantial evidence will support the agency action. Under chapter 75, on the other hand, the agency must prove by a "preponderance of the evidence" that the employee committed the misdeeds with which he is charged, that imposition of discipline will promote "the efficiency of the service," and that the penalty selected is reasonable. Penalties here are of a punitive nature when imposed for misconduct. The difficulties of proof as required under chapter 75 are manifest and Congress was highly motivated to find another, better way to deal with unacceptable performance cases; hence chapter 43. Now we are confronted by this challenge as to what it intended, and with the suggestion that we should encumber

the new chapter with old meanings not given to it by Congress.

The conclusion in *Douglas* that the MSPB could mitigate penalties assessed under chapter 75 was based on considerations not anywhere present under chapter 43. Three principal factors explain that decision: (1) the fact that the board's predecessor agency, the Civil Service Commission, had mitigated penalties in chapter 75 actions and that this authority was inherited by the board by virtue of Reorganization Plan No. 2 of 1978 at a time when chapter 43 did not exist; (2) the board's conclusion that the continued exercise of such authority under the subsequent Reform Act was not inconsistent with the statutory terms of chapter 75 or its legislative history; and (3) the historic relationship of the penalty to the efficiency of the service standard in chapter 75 actions. We hold that these grounds provide no basis whatever for the board to extend its holding in *Douglas* to chapter 43 actions, which have an entirely different genesis. We accept the board's discussion in regard to these issues.

Petitioner makes the further argument that it would be illogical and unfair not to let the board mitigate penalties under chapter 43 when it can do so under chapter 75, even for criminal conduct. But, we perceive it to be our responsibility to construe statutes so as to give full force and effect to what Congress intended. That intent here clearly was to allow an agency, with as few restrictions as due process would permit, to demote or remove an incompetent employee and replace him with a competent worker. Congress declared this as a merit system principle in 5 U.S.C. § 2301(b)(6). We adhere to this clear declaration of congressional purpose and reject the appeal to return to the old system Congress sought to replace with the new chapter 43.

Management best knows its needs and the potential of its employees to further an agency's statutory mission.

To permit the MSPB to mitigate demotion or removal would vest it with management prerogatives not intended. Worse, it would permit the board to require an agency to retain an incompetent worker in situations where it proposed removal. Positions should be filled by those who can be expected to satisfy minimum job requirements. Lisiecki illustrates the problem. When removed in 1984 he was a GS-11 who had not been promoted since 1975. Most examiners in the agency became GS-12s. Yet, the presiding official ruled that he should be retained at a GS-9, the entry-level grade for examiners. When he was removed he had been employed for almost 12 years by his agency. There is no record here that the agency had sufficient work for a permanent GS-9 who had demonstrated incapacity for meaningful advancement or whether there even was a GS-9 vacancy.[8]

The Reform Act establishes that Congress intended that employees should not have a vested right to a position but rather only those rights expressly stated by statute and regulation. The right to have MSPB review of the section 4303(a) sanctions for mitigation purposes is not one of those rights. This is the conclusion most in harmony with the Reform Act's overall design and purpose. No inherent or implied powers of the MSPB can be discerned to alter this result. Specifically, therefore, we reject the suggestion that such powers derive in any way from section 7701 (the board's authority to hear a case appealable under any law, rule, or regulation); or under section 4303(e) (which is derivative of section 7701); or under section 1205(a) (to "take final action" on any matter within its jurisdiction); or under section 7703(c) (for judicial review, generally, of agency actions).

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[8] Petitioner says these are among the issues that would be resolved if the MSPB permitted a hearing on mitigation of the sanction. The presiding official resolved these issues in petitioner's favor in the initial decision which the Board reversed.

IV

The court has recently addressed in detail the interrelation of chapters 43 and 75. *Lovshin* v. *Department of the Navy*, No. 84-1002 (Fed. Cir. June 21, 1985) (in banc). In that case it was held an agency still has the option of pursuing a performance-based case under chapter 75, as was done before the Reform Act of 1978. If it does, however, it is bound by the substantive and procedural requirements of that chapter. On the other hand, if chapter 43 is the option chosen, the procedures and standards thereunder apply. The latter are described by *Lovshin* as more "narrowly reviewable," slip op. at 16, and lesser sanctions than demotion or removal are held not to be authorized.[9]

Further, and critical to the present case, it was held in *Lovshin* that once an agency has set up an approved performance appraisal system, has communicated the performance standards and critical elements of an employee's position to the employee at the start of the appraisal period, has warned of inadequacies in "critical elements" during the appraisal period, and has afforded counseling and an opportunity for improvement after proper notice, an agency may reduce in grade or remove an employee for receiving a rating of "unacceptable" in a single critical element. "No more is required of the agency; that is, a removal or demotion on the basis of an 'unacceptable performance' *rating* on a 'critical element' is not subject to any of the substantive or procedural requirements of Chapter 75." *Lovshin*, slip op. at 15. (Emphasis in original.)

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[9] An agency can bring a "mixed case" relying on chapter 43 for unacceptable performance in a critical element with an alternative or additional charge under chapter 75 for such cause as will promote the efficiency of the service. In such cases the standard of review by MSPB would be applied according to the basis for each specific charge. A performance-based case under chapter 75 would enable the agency to impose a lesser sanction for poor performance than removal or demotion, the only sanctions authorized by chapter 43. *Lovshin*, slip op. at 37.

Board review for penalty mitigation is established under chapter 75 but we now reiterate that this is one of the requirements to which actions under chapter 43 are not subject. This follows logically from the further fact that while section 7512 of chapter 75 applies to removals and to reductions in grade and pay, subsection D states that it is not applicable to removals or reductions under section 4303 of chapter 43. While in the legislative history and language of the Reform Act mitigation is not specifically addressed, viewed in their entirety, they convey the clear and irrefutable implication, as described in *Lovshin*, that chapter 43 is "independently operative," slip op. at 17, that "the agency need not prove . . . that removal or demotion is an appropriate penalty," slip op. at 16, and thus it follows that agency actions under chapter 43 are not bound by the language, practices, or case law applicable to chapter 75.

The parties in this well-briefed and well-argued case have raised additional points for consideration. We conclude that it is unnecessary to reach them in view of our disposition of the appeal on the grounds discussed above.

CONCLUSION

Neither the language of the Civil Service Reform Act of 1978 nor its legislative history demonstrates that Congress intended the Merit Systems Protection Board to review and, where deemed appropriate, to mitigate penalties in chapter 43 cases. The Reform Act does not make the MSPB's adjudicatory powers coextensive in chapter 43 and chapter 75 cases. We decline the invitation of petitioner to extend the statute beyond what we perceive to be the congressional intent behind it. The MSPB was therefore correct when it reversed the initial decision of its presiding official and sustained the action of the Federal Home Loan Bank Board in removing petitioner from his position for unacceptable performance in a critical element of his position, pursuant to 5 U.S.C.

§ 4303. There was no harmful error in this, no prohibited personnel practice, and nothing contrary to law. Pursuant to the statutory scope of review, 5 U.S.C. § 7703(c), we conclude that there is no basis on which to reverse the MSPB decision.

AFFIRMED.

APPENDIX

5 U.S.C. § 4303 (1982)

§ 4303. *Actions based on unacceptable performance*

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b) (1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title.

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number CH04328410250

LEONARD L. LISIECKI,
Appellant,

v.

FEDERAL HOME LOAN BANK BOARD,
Agency.

Date: 22 Oct. 1984

OPINION AND ORDER

This case presents the issue of whether the Board has authority to modify removal or demotion [1] actions taken under 5 U.S.C. § 4303. In Part I, we discuss the agency's charges of unacceptable performance and the appellant's response to those charges. For the reasons set forth in Part II of this Opinion, the Board concludes that it does not have the authority to review or modify the agency's choice of a removal or demotion in Chapter 43 actions.

Part I

The appellant was removed under 5 U.S.C. § 4303 from his position of Savings and Loan Examiner, GS-11, for

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[1] For the sake of brevity, the Board utilizes the term "demotion" in this Opinion and Order although we note that the statutory language refers to "reductions in grade." 5 U.S.C. §§ 4303(a) and (b).

unacceptable performance in one of the critical elements of his position. The action was effective February 7, 1984.

On appeal to the Board's Chicago Regional Office, the appellant contended that the agency had not assisted him in improving his performance during a six-month period from April 1983 to October 1983 in which he was provided with an opportunity to improve under a "Corrective Action Work Plan" (CAWP). Agency File, Tab 3. The appellant also contended that the action was taken in reprisal for the appellant having allegedly exposed fraud and waste on the part of agency employees to higher level management officials in 1978. Following a hearing, the presiding official found that: (1) the agency action was taken under a performance appraisal system that had been reviewed and approved by the Office of Personnel Management (OPM); (2) the agency had shown by substantial evidence that the appellant's performance was unacceptable in a critical element of his position; (3) the agency had complied with all the requirements specified in the CAWP for assisting the appellant to improve his performance and there was no merit in appellant's contentions that he did not receive all the data necessary to complete the assigned projects; and (4) appellant had failed to establish his affirmative defense that the agency had engaged in a prohibited personnel practice in violation of 5 U..SC. § 2302(B)(8)(A). *Initial Decision* (I.D.) at 1, 3-4.

The presiding official further found, however, that the Board had both the authority and responsibility to review the agency's choice of a removal or demotion action taken under 5 U.S.C. § 4303 to assure that the agency's exercise of managerial discretion had been properly exercised within the tolerable limits of reasonableness.[2] *Douglas* v.

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[2] The presiding official cited *Frisby* v. *Department of the Treasury*, 10 MSPB 11, 13 (1982), for the proposition that the Board had extended its authority to review the agency's choice of a

Veterans Administration, 5 MSPB 313, 329 (1981). The presiding official found that the appellant had performed satisfactorily as a Savings and Loan Examiner for over ten years prior to the action; that the agency had rated the appellant as unsatisfactory on only one out of four projects during the CAWP period; and that the appellant had performed satisfactorily at the GS-9 level during this period. Based on these findings, the presiding official found that a demotion to a GS-9 position was the most severe action the agency could reasonably take in this case and he ordered the agency to cancel the removal action and substitute a demotion to a GS-9 position in its place.

The agency has filed a timely petition for review, contending that: (1) the Board has no authority to review the agency's choice of a removal or demotion in actions taken under § 4303; (2) the Board's decision in *Douglas*, *supra*, provides no basis for the Board to find that it has any authority to modify the agency's Chapter 43 action; and (3) even assuming that the Board has such authority, the mitigating factors which the presiding official considered are not supported by the weight of the evidence. In response to the agency's petition, the appellant reiterates his contentions that he did perform in a fully satisfactory manner during the CAWP period and he urges the Board to affirm the presiding official's finding that the agency's choice of a removal action was unreasonable.[3] Pursuant to 5 U.S.C. § 7701(e)(1), the agency's petition for review is GRANTED.

Chapter 75 sanction to Chapter 43 actions. Although the agency's action in *Frisby* was originally brought under Chapter 43, the action was readjudicated using the standards of 5 U.S.C. Chapter 75 pursuant to *Wells* v. *Harris*, 1 MSPB 199 (1979). In *Frisby*, the Board did not address the issue of whether the Board's authority to review Chapter 75 penalties extended to Chapter 43 actions.

[3] The appellant also contends that the agency is precluded in its petition for review from making any arguments based on the appellant's performance which occurred prior to April 1983 because

Part II

Whether The Board Has Authority To Modify Actions Taken Pursuant to 5 U.S.C. § 4303

By Federal Register Notice dated June 26, 1984, the Board invited the submission of *amicus* briefs on five issues concerning agency actions taken under 5 U.S.C. § 4303, including the issue of whether the Board has authority to modify an agency's decision to remove or demote an employee taken pursuant to 5 U.S.C. § 4303.[4] Briefs were filed by (OPM) and by a number of other federal departments and agencies; by three federal employee unions and by five individuals.[5] Requests for oral

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the parties agreed at the pre-hearing [conference] that only the appellant's performance that occurred during the CAWP period from April-October 1983 "would be used during the hearing." This contention may be construed as an assertion that the agency relied on stale instances of unacceptable performance in violation of 5 U.S.C. § 4303(c)(2)(A). Since the appellant did not timely petition for review of this issue, the Board will not consider it. *Jackson* v. *Department of Transportation*, 5 MSPB 95 (1981). Additionally, we note that the agency specifically relied on appellant's unsatisfactory performance during the CAWP period as a reason for taking the action and the presiding official found that the agency had proven that the appellant's performance was unacceptable during this period. This finding was sufficient to sustain the action without any consideration of appellant's earlier performance.

[4] 49 Fed. Reg. 26166, correction notice at 49 Fed. Reg. 27223 (July 2, 1984). Concerning the issue of the modification of agency actions, the notice also requested interested parties to address what standards might be applicable if the Board has such authority and whether the Board could modify removal and demotion actions to suspension or other actions. In view of our decision in this case, we find it unnecessary to reach these additional issues.

[5] *Amicus* briefs were received from OPM and the Departments of Army, Navy, Air Force, Health and Human Services, Agriculture, Labor, Energy, and Treasury; Internal Revenue Service, Nuclear Regulatory Commission, U.S. Customs Service, Veterans Administration, National Labor Relations Board; American Federation of Government Employees, National Federation of Federal Employees, and National Treasury Employees Union.

argument, filed by OPM and the Veterans Administration, are hereby DENIED.

In these *amicus* briefs, OPM and most federal agencies contend that the Board has no authority to modify actions taken pursuant to 5 U.S.C. § 4303 because the exercise of such authority would frustrate Congressional intent in enacting the Civil Service Reform Act of 1978.[6] These *amici* also contend that the Board's decision and reasoning in *Douglas*, *supra*, wherein the Board held that it had the authority to mitigate agency penalties imposed in Chapter 75 actions, does not extend to Chapter 43 actions. Three federal employee unions and two agencies, however, contend that the Board's reasoning in *Douglas* applies equally to Chapter 43 actions as it does to Chapter 75 actions and that the Board's authority to modify Chapter 43 actions is consistent with Congressional intent as shown in the Reform Act.

A. *The Legislative History*

In enacting the Reform Act, Congress created a new statutory scheme for actions based on unacceptable performance and references to misconduct are conspicuously absent from both the statutory language of Chapter 43 and its legislative history.[7] In discussing the new per-

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[6] Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of title 5, United States Code) (hereinafter, the 'Reform Act').

[7] *See* 5 U.S.C. §§ 4301-4305; *See* S. Rep. No. 95-969, 95th Cong., 2d Sess. 39-46 (1978) *reprinted in* House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess. 1503-10 (Comm. Print No. 96-2, 1979) [hereinafter referred to as *Senate Report* and *Legislative History*, respectively]. The House Report contains a reference to actions based on unacceptable performance as "disciplinary actions." This reference, however, is not explained and there is no reference to misconduct. *Legislative History* at 657-8 (*House Report* at 20-1).

formance appraisal systems mandated by section 4302, Alan Campbell, then Chairman of the Civil Service Commission (CSC) and the Administration's chief spokesman for the legislation, stated that these systems would provide a "single integrated framework" for managers to make a number of decisions on the performance of their employees and would provide a "more effective and equitable means of managing . . . employees." [8] Consequently, Chapter 43 removal and demotion actions may be viewed as a proper managerial means of addressing unacceptable performance rather than as punishment for misconduct.

OPM's regulations are consistent with this view: in describing the consequences of an employee's failure to demonstrate acceptable performance, the regulations refer to "remedial" actions, including within-grade denials, demotions, and removals. 5 C.F.R. § 430.202(e) (1983). Additionally, in its guidance to agencies OPM has taken the position that an employee's inability to perform is never cause for a Chapter 75 action and has also recommended that agencies not include specific remedies for poor performance in their tables of penalties for disciplinary actions.[9]

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[8] *Civil Service Reform: Hearings on H.R. 11280 Before the House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess. 31 (1978) [hereinafter referred to as *House Hearings*]; *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 102-3 (1978) [hereinafter referred to as *Senate Hearings*].

[9] FPM Letter 432-1 at 2 (May 5, 1983). In a decision issued simultaneously with the decision in this appeal, the Board has addressed the issue of whether Chapter 43 is the exclusive procedure for performance-based actions. *See Gende* v. *Department of Justice*, MSPB Docket No. CH07528410223 (October 22, 1984). In that decision, the Board has ruled that, with few exceptions, Chapter 43 is the exclusive procedure for performance-based actions effected after October 1, 1981.

OPM's guidance to agencies regarding what grounds serve to bar an employee's eligibility for a discontinued service retirement annuity under 5 U.S.C. § 8336(d) is also consistent with the conclusion that removal for unacceptable performance is different from removal for misconduct with respect to due process analysis. *See, e.g., Debose* v. *Department of Agriculture*, 700 F.2d 1262 (9th Cir. 1981). Thus, although the statutory language of 5 U.S.C. § 8336(d) bars an employee whose involuntary separation is based on delinquency or misconduct from receiving such an annuity, OPM has provided that removal for inefficiency is not a bar, as long as the inefficiency was not due to misconduct. FPM Supp. 831, Subchapter 11-2(a). In view of the above considerations, we find that Chapter 43 actions are remedial in nature.

In support of their contention that the Board has the authority to review and modify the remedy selected by agencies in Chapter 43 actions, five *amici* who filed briefs argue that Congress intended, in enacting the Reform Act, to protect employees from unfair or arbitrary treatment and that the Board's exercise of modification authority in Chapter 43 actions would be consistent with and further this intent. These *amici* are correct in pointing out that Congress included a number of procedural and substantive safeguards in Chapter 43 to protect employees from unfair treatment. Congress identified minimum requirements for agency performance appraisal systems and provided for OPM review and approval of these systems. 5 U.S.C. §§ 4302, 4304. Additionally, the statute also requires that employees must first be given an opportunity to demonstrate acceptable performance before action is taken, that the proposal notice identify specific instances of unacceptable performance that occurred no earlier than a year preceeding the notice, and that the decision have the concurrence of a higher level official. *See* 5 U.S.C. §§ 4302(b)(6); 4303(b)(1), (c)(2).

While we find that the statute and its legislative history [10] reflect a concern with employee rights, we conclude that this language provides an insufficient basis for the Board to extend its holding in *Douglas* to Chapter 43 actions. First, we find that these references to employee rights are outweighed by language indicating that the dominant intent of Chapter 43 was to "simplify and expedite procedures for dismissals of Federal employees whose performance is below the acceptable level . . . ." *Senate Report* at 10; *see also Senate Report* at 2-4, 9, 40, 43. In *Wells*, the Board examined the legislative history of Chapter 43 at length and concluded that this chapter "originated as a relief measure for agencies and it was enacted for that purpose." [11] *Wells*, *supra*, at 236. It is also apparent from this legislative history that Congress believed that Chapter 75 procedures were ineffective and made it virtually impossible to remove employees whose performance was unacceptable. In examining the major reforms that the bill would make in this area, Congress noted the "widely held impression . . . that a government employee cannot be fired, regardless of unacceptable conduct or work performance", and Congress expressed disapproval of the miniscule number of dismissals for poor performance that occurred under the

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[10] "S. 2640 will accelerate the personnel action process while protecting employees' rights to fair treatment." *Senate Report* at 10. "These new procedures will make it possible to act against ineffective employees with reasonable dispatch, while still providing the employee his due process rights." *Id.* at 40. "[A third purpose of the bill is] to assure that merit principles and employee rights are tightly protected." *Legislative History* at 1612 (Statement of Senator Percy on Senate Floor).

[11] Although the Board found in *Wells* that Congress intended to expedite and simplify actions based on unacceptable performance, the Board also found that Congress did not intend employees to be subject to § 4303 actions in the absence of a performance appraisal system that meets the requirements of § 4302.

existing adverse action and appeals procedures.[12] Congress concluded that managers' reluctance to take action against employees who were not performing was due to a number of factors, principally "inordinate procedural requirements and unreasonable standards." *Senate Report* at 40. The need for reform was articulated by members of both Houses, who expressed strong disapproval of the existing adverse action procedures which they contended had become a refuge for incompetent employees.[13] To remedy these defects, Congress created a separate, streamlined statutory scheme for actions based on unacceptable performance. While Congress retained the requirement that an agency establish that its action promote the "efficiency of the service" in Chapter 75, Congress expressly eliminated this requirement in Chapter 43. *Senate Report* at 43. It is also evident that in rejecting this requirement Congress demonstrated a clear intent to also eliminate, as to Chapter 43 actions, the judicial gloss that had developed around the "efficiency of the service" requirement for the more than fifty years that agencies had been obliged to observe this requirement in taking adverse actions.[14] Thus, in summarizing some of the

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[12] Statistics which CSC provided to Congress during the proceedings on the Reform Act indicated that in 1976 removals for misconduct outnumbered removals for inefficiency nearly 14 to 1 and that only .004 per cent of federal employees were removed for inefficiency. *Senate Report* at 9. *See also* 123 Cong. Rec. H8. 470 (daily ed. Aug. 11, 1978) (House Floor Statement).

[13] "Since the Second Hoover Commission in the 1950's, complaints have been heard that existing procedures have become the refuge of the incompetent employee. The existing system impairs the ability of managers to effectively perform their program responsibilities." *Legislative History* at 1607 (Statement of Senator Ribicoff on Senate Floor). "Today we are threatened by an even greater spoils system which through its hiring and firing policies, virtually guarantees a job to anyone who passes a year's probation." *Id.* at 818 (Statement of Congressman Quayle on House Floor).

[14] The requirement that the adverse action promote the efficiency of the service originated with the Lloyd-LaFollete Act of 1912, Sec. 6, 37 Stat. 539 (August 24, 1912).

differences between Chapter 43 and Chapter 75, the Senate report explained:

> One of the chief differences between the procedures currently applicable at the agency level and the proposed procedures concerns the standards governing the agency's action. Under current law, an employee may be dismissed for unacceptable performance only if dismissal would improve the efficiency of the service. As a practical matter, agencies have found it difficult to prove this to the degree required by the courts through a series of judicial decisions. Section 4303(a) imposes a new standard. It is "performance which fails to meet established requirements of one or more critical elements of the job." The Committee *intends that this new standard should not be governed by the existing case law defining the present standard, "such cause as will promote the efficiency of the service."* [Emphasis supplied.] *Id.* at 43.

Congress also concluded that agencies should have the benefit of a less burdensome standard of proof in actions taken for unacceptable performance.[15] Thus, Congress provided that an action "based on unacceptable performance as described in section 4303" shall be sustained if the decision is supported by substantial evidence. 5 U.S.C. § 7701(c)(1)(A); 5 C.F.R. § 1201.56(c)(1). This standard is generally interpreted as imposing a lighter evidentiary burden on the agency than the preponderance of the evidence standard and authorizing a less intrusive review

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[15] In explaining the reasons for the adoption of a lower evidentiary standard, the Senate Report stated that: "An agency's assessment of an employee's overall performance . . . may be less susceptible to proof through traditional trial-type procedure than when the agency takes an adverse action on the basis of employee misconduct which is linked to specific, provable offenses." *Senate Report* at 44.

of the agency decision. *Senate Report* at 54-5; *Parker* v. *Defense Logistics Agency*, 1 MSPB 489, 504 (1980). For all other cases, Congress provided that the preponderance of the evidence standard would govern. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(c)(2).

While those *amici* who argue that the Board has authority to modify agency actions taken under Chapter 43 acknowledge this legislative history and acknowledge the differences between Chapter 43 and Chapter 75 actions, some of these *amici* contend that these differences are irrelevant in determining whether the Board has the authority to modify Chapter 43 actions. One union *amicus* further argues that Congress' adoption of the substantial evidence standard for Chapter 43 actions represents a minor difference in wording which does not support the conclusion that Congress did not intend the Board to modify Chapter 43 actions. We find these positions unpersuasive. As shown by the foregoing analysis, the legislative history supports the view that Chapter 43 was the centerpiece of the Reform Act. Adoption of the substantial evidence standard and the elimination of the efficiency of the service requirement for Chapter 43 actions comprise the cornerstone of this new statutory scheme. The Senate Report described the change in the standard of proof as the "most important part" of the proposed Chapter 43 provisions. *Senate Report* at 44. One of the sponsors of the Senate Bill, Senator Percy, described the change in the evidentiary standard as "the core of the legislation" and further stated that "this single reform alone is worth the tremendous effort that has been put into the legislation." *Legislative History* at 1727 (Statement on the Senate Floor). It is also clear that Congress viewed the "efficiency of the service" standard as a roadblock that would impede agency efforts to remove poor performers and Congress expressly rejected this standard in Chapter 43 actions for this reason. *Senate Report* at 43.

Thus, in enacting the Reform Act, Congress provided for two changes which had both the intent and the effect of fundamentally limiting the Board's scope of review and standard of review in Chapter 43 actions. We find that the legislative history concerning these changes is the clearest indication of a Congressional intent to restrict the Board's authority in reviewing Chapter 43 actions. None of the *amici* in favor of mitigation dispute the fact that the Board exercise of any authority to modify Chapter 43 actions would add an additional element to the agency's burden of proof and would thus result in a more intrusive review of the agency's action by the Board. In the absence of any express treatment by Congress of the subject of mitigation,[16] we find the most supportable conclusion in harmony with the purpose and design of Chapter 43 is that Congress did not intend the Board to modify agencies' Chapter 43 actions. The exercise of such authority would represent a return to the "old system" standards applicable to Chapter 75 inefficiency cases and these standards were expressly rejected by Congress in enacting Chapter 43.

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[16] During the hearings on the Reform Act, a federal employee union and a professional organization voiced objections to the proposed standards of review for Chapter 43 actions on the grounds, *inter alia*, that there was no provision for the Board to review and "mitigate the penalties" for such actions. *House Hearings* at 208-9, 297; *Senate Hearings* at 675, 1397-9. In his final statement at the conclusion of the House hearings, the then Chairman of the Civil Service Commission stated that, under the proposed legislation, it was expected that each agency would be free to determine its own disciplinary penalties and that a disciplinary action should not be overturned because an appeals officer, arbitrator, administrative law judge, or court decided the penalty was too severe. *House Hearings at 831-2.* It is unclear whether this language referred to Chapter 43 actions, Chapter 75 actions, or to both types of actions. None of the committee reports included in the legislative history contains any further references or discussion concerning the Board review of the sanctions in either Chapter 43 or Chapter 75 actions.

This conclusion is also buttressed by our finding, discussed in the next section, that the Board's authority to mitigate Chapter 75 penalties is inexorably linked to the efficiency of the service requirement which Congress rejected in Chapter 43 actions but retained in Chapter 75 actions. Additionally, we find support for our conclusion in the statutory language of section 4303(a), which states in its opening clause that:

> *Subject to the provisions of this section*, an agency may reduce in grade or remove an employee for unacceptable performance. [Emphasis supplied.]

In *Wells*, the Board interpreted this opening clause as evidencing a Congressional intent that "no additional procedural standards, such as those imposed by prior law, regulation or judicial interpretation would be required of agencies in § 4303 actions." *Wells*, *supra*, at 215 n.35. Congress included a number of procedural and substantive safeguards in Chapter 43 to protect employees from unfair treatment, *e.g.*, an opportunity to demonstrate acceptable performance [5 U.S.C. § 4302(b)(6)]; and the requirement that the decision have the concurrence of a higher level official [5 U.S.C. § 4303(b)(1)]. The purpose of the requirement for such concurrence, according to the Senate Report, was to provide a safeguard against "unwarranted or ill-considered action." *Senate Report* at 43. Since Chapter 43 contains no provisions which restrict or otherwise address the agency's selection of a removal or demotion action, we find that the limiting language of the opening clause of § 4303 suggests that Congress did not intend the Board to impose a standard of reasonableness (or any other standard) on the exercise of the agency's discretion in this area. Additionally, we note that one court which examined the legislative history of Chapter 43 concluded that, as between removal and demotion actions, "Congress may have intended to encourage

dismissal as the preferred sanction. . . ." [17] *Stankis* v. *Environmental Protection Agency*, 713 F.2d 1181, 1186 (5th Cir. 1983). This conclusion was based on the court's finding that the Congressional history is filled with references suggesting that "the primary purpose of the law is to make it easier to *remove* incompetent employees." *Id.* [Emphasis by the court.]

Finally, we note two provisions of the Reform Act which indicate that Congress did consider situations where removal for unacceptable performance was inappropriate, and where Congress expressly provided for a demotion or reassignment. Thus, in lieu of removal, 5 U.S.C. § 3321(b) provides that an employee who, for reasons of deficient supervisory or managerial performance, does not satisfactorily complete the probationary period is entitled to be assigned to a position of no lower grade and pay than the employee left to accept the supervisory or managerial position. 5 C.F.R. § 315.907; *see also* 5 U.S.C. § 4303(f)(1). Similarly, career appointees in the Senior Executive Service (SES) who fail to demonstrate fully successful executive performance are entitled to be placed in GS-15 or above positions of equivalent tenure to the positions they occupied before their appointments to the SES positions. 5 U.S.C. § 3594; 5 C.F.R. § 359.701 *et seq.* These provisions may be viewed as statutorily mandated modifications since the agency is precluded from taking a removal action in these situations. As a general rule of statutory construction, the expression of one restriction or exception indicates that no other restrictions or exceptions apply. *See* 2A C. Sands, *Sutherland Statutory Construction* §§ 47.11, 47.23

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[17] We note, however, that we do not agree with the court's ultimate holding that the preponderance of the evidence standard is the appropriate standard for the Board to apply in reviewing agencies' denials of within grade increases. In *Parker*, *supra*, at 504, the Board held that the substantial evidence standard governed such actions. 5 U.S.C. § 7701(c)(1)(A).

(4th ed. 1973). Since these two restrictions on the agency's authority to remove an employee were the only statutory limitations which Congress provided, it may be assumed that these were the only restrictions that Congress intended.

B. *Applicability of the Board's Decision in Douglas To Chapter 43 Actions*

In support of their position that the Board has authority to modify Chapter 43 actions, five *amici* who briefed this issue argue that the Board's decision and reasoning in *Douglas* is equally applicable to Chapter 43 actions as to Chapter 75 actions. OPM and most agency *amici* contend, however, that the grounds on which the Board ultimately relied in *Douglas* in concluding that it had the authority to modify penalties in Chapter 75 actions are totally inapposite in Chapter 43 actions. We agree with OPM and the majority of the federal agency *amici*.

The Board's rnuling in *Douglas* was based upon three factors: (1) the fact that the Board's predecessor agency, the Civil Service Commission, had mitigated penalties in Chapter 75 actions and that this authority was inherited by the Board by virtue of Reorganization Plan No. 2 of 1978;[18] (2) the Board's conclusion that the continued exercise of this mitigation authority was not inconsistent with either the express statutory terms of Chapter 75 or its legislative history; and (3) the relationship of the

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[18] In *Douglas* the Board found that the Commission's mitigation authority was based on 5 U.S.C. § 7701 (1967), 5 U.S.C. §§ 1104(a)(5) and (b)(4) (1977). The Board stated that the former provision related only to adverse action appeals of preference eligibles and required agencies to "take the corrective action the Commission finally recommends." The latter provisions established a statutory basis for the Commission's function of "hearing or providing for the hearing of appeal" and "taking . . . final action" in all matters appealable to it, including the enforcement of its decisions. *Id.* at 319-20.

penalty to the efficiency of the service standard in Chapter 75 actions.

We find that none of these grounds provides any basis for the Board to extend its holding in *Douglas* to Chapter 43 actions. With regard to the first factor, we find that although the Board's records of the Commission's decisions in Chapter 75 appeals are admittedly incomplete, it appears that the Commission rarely mitigated the penalty in performance based Chapter 75 actions.[19] Even if we were to conclude that the Commission mitigated in such inefficiency cases, this fact would not be dispositive of whether the Board has authority to modify Chapter 43 actions. Whatever mitigation authority the Commission exercised in regard to pre-Reform Act performance-based actions has no relevancy to Chapter 43 actions since the Commission's mitigation authority was exercised under Chapter 75 rather than Chapter 43, which did not then exist. Moreover, we note that the Board has exercised authority to mitigate penalties in performance-based Chapter 75 cases. *See, e.g., Hatler* v. *Department of the Air Force*, 6 MSPB 605 (1981); *Brewster* v. *Department of the Navy*, 6 MSPB 547 (1981). As we explained in *Brewster*, however, in determining whether an appellant's removal will promote the efficiency of the service, the Board is in effect deciding if the penalty of removal is reasonable under the circumstances. *Id.* at 548.

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[19] None of the *amicus* briefs, including OPM's, sheds any light on the issue of whether the Commission mitigated penalties in pre-Reform Act performance-based Chapter 75 cases. In its 1976 guidance to agencies, the Commission provides one example of a case where it found that the agency's removal penalty was too harsh. FPM Supp. 752, subch. 3-2(b)(4). The employee was charged with inefficiency shortly after being promoted to another position. The Commission's finding that the action was unwarranted, however, was based on the efficiency of the service requirement and it is unclear whether the Commission itself mitigated the penalty or completely reversed the agency action.

A second issue which the Board carefully considered in *Douglas* focused on whether the Board's exercise of mitigation authority in Chapter 75 actions was limited by any provision of the Reform Act. In this regard, the Board concluded that section 905 of the Reform Act would preclude the Board from exercising any mitigation authority if this function was "inconsistent with any provision of the Reform Act." *Douglas* at 321. Based on its analysis of the legislative history of Chapter 75, the Board concluded that no inconsistency existed since Congress did not alter the standard of review or scope of review which the Commission previously exercised in Chapter 75 actions. *Id.* at 326. The same statutory limitation imposed by section 905 is clearly applicable in the instant case, since a central issue is whether the Board's inherited modification authority extends to Chapter 43 actions.[20] An additional statutory limitation is also evident in 5 U.S.C. § 1205(a), which provides that the Board's authority to "take final action" on any matter within its jurisdiction is expressly "subject to otherwise applicable provisions of law." This limitation is particularly significant in view of the Board's finding that section 1205(a) was the primary vehicle through which the Board inherited its authority to mitigate Chapter 75 actions. *Douglas* at 321. Based upon the foregoing analy-

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[20] The *amici* who contend that the Board has authority to modify Chapter 43 actions argue that this authority is also inherent in the Board's authority to take final action under § 1205. We agree that the question of whether the Board can modify Chapter 43 actions is not limited to a consideration of whether the authority the Board inherited from the Commission is applicable to Chapter 43. For the reasons stated above, however, we find that § 1205 cannot serve as a basis for finding that the Board has any inherent modification authority in Chapter 43 actions. For the same reasons, we also find that although § 7701 provides for a *de novo* review by the Board of both factual and legal questions, this provision does not confer any inherent authority to modify Chapter 43 actions because the exercise of such authority would be inconsistent with the legislative history of Chapter 43.

sis of the legislative history of Chapter 43, we find that Congress made significant changes in the standards and scope of review for Chapter 43 actions. Hence, we can make no comparable finding, as we did in *Douglas* in assessing the impact of the Reform Act on the Board's mitigation of Chapter 75 actions, that the exercise of a similar authority in Chapter 43 actions is not inconsistent with the Reform Act.

The third factor which provided a basis for mitigation authority in the Board's decision in *Douglas* was the close relationship between the penalty and the promotion of the efficiency of the service. Although we found that the determination of whether a particular penalty is warranted is a separate determination from that of whether the agency has fulfilled the efficiency of the service requirement, we also concluded that the efficiency of the service was the "ultimate" criterion for determining the reasonableness of the penalty. *Douglas* at 330. As stated above, Congress expressly rejected the efficiency of the service standard in Chapter 43 actions. Thus, we agree with OPM's position that the "argument made successfully in *Douglas* that the penalty in an adverse action is inexorably tied to the promotion of the efficiency of the service requirement is totally inapposite in Chapter 43 performance actions where that standard is expressly inapplicable." OPM Brief at 33.

A final argument urged upon the Board in support of the position that the Board has authority to modify Chapter 43 actions is based on the standards of judicial review in 5 U.S.C. § 7703(c) that are applicable to the Board's decisions. In this regard, some *amici* contend that it is incumbent upon the Board to review the agency's choice of a Chapter 43 removal or demotion action in order to provide the courts with a basis to review the same issue. The proponents of this view ignore the fact that it is for the courts and not the Board to determine the scope of the courts' jurisdiction pursuant

to statute. *Gilman* v. *Office of Personnel Management*, No. 84-764, slip op. at 5 (Fed. Cir. September 12, 1894). The Court of Appeals for the Federal Circuit recently stated that "Section 7703(c) does not define MSPB jurisdiction at all but rather states this court's standard of review for MSPB decisions." *Manning* v. *Merit Systems Protection Board*, No. 84-646, slip op. at 7 (Fed. Cir. September 10, 1984). Hence, we find that nothing in § 7703 compels the conclusion that it is incumbent upon the Board to review the agency's choice of a Chapter 43 removal or demotion action.

Conclusion

For the foregoing reasons, the Board concludes that it has no authority to review the agency's choice of a removal or demotion action taken under 5 U.S.C. § 4303. Accordingly, the initial decision of the presiding official in this appeal, issued on May 29, 1984, is hereby REVERSED as to his finding modifying the agency action and the agency's removal action is hereby SUSTAINED.

This is the final decision of the Merit Systems Protection Board in this case. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

/s/ Herbert E. Ellingwood
HERBERT E. ELLINGWOOD
Chairman

/s/ Dennis M. Devaney
DENNIS M. DEVANEY
Member

Washington, D.C.

OPINION OF VICE-CHAIR MARIA L. JOHNSON DISSENTING FROM THE OPINION AND ORDER

In this case, the majority opinion concludes that the Board has no authority to review or modify the agency's choice of a removal or demotion action taken pursuant to 5 U.S.C. § 4303. In support of this conclusion, the opinion finds that (1) Chapter 43 actions are intended to be remedial actions rather than to punish employees; (2) the exercise of modification authority in Chapter 43 actions would frustrate Congressional intent, as shown in the Reform Act,[1] to simplify and expedite such actions; and (3) the Board's decision and reasoning in *Douglas* v. *Veterans Administration*, 5 MSPB 313 (1981), do not provide any basis to extend the Board's modification authority to Chapter 43 actions.

For the reasons set forth below, I respectfully dissent. I find that the Board's authority to review and modify Chapter 43 sanctions is an inherent part of the powers which Congress granted to the Board under 5 U.S.C. § 7701 and § 1205(a), and that nothing in the Reform Act or its legislative history evidences a Congressional intent to preclude the Board from exercising this authority. Consistent with Congressional intent in enacting Chapter 43, however, it is clear that the Board's review of Chapter 43 sanctions is more limited in scope than the Board's review of Chapter 75 penalties, and the Board should modify the agency's sanction only when the agency has clearly abused its discretion.

I find that the majority opinion's analysis of Congressional intent in regard to the Board's modification authority is incomplete and disregards fundamental rules of statutory construction. Moreover, the conclusion that Congress intended to foreclose any and all review by the Board of Chapter 43 sanctions is impossible to reconcile

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[1] Civil Service Reform Act of 1978, Pub. L. 94-954, 92 Stat. 1111.

with well-settled principles of administrative law as well as the authority which Congress clearly intended the Board to exercise as an independent adjudicatory agency whose final decisions are subject to judicial review, as provided in 5 U.S.C. 7703.

The Relevant Legislative History

The legislative history of the Reform Act contains no express indication of Congressional intent with regard to the Board's exercise of modification authority in either Chapter 43 or Chapter 75. In the face of this silence, the strength of any conclusions that can be drawn from the legislative history must necessarily rest on a showing that one conclusion is more in harmony with the statute's overall design and purpose than a contrary conclusion.[2] *Weinberger* v. *Hynson, Westscott, and Dunning, Inc.*, 412 U.S. 609, 93 S.Ct. 2469, 37 L.Ed. 2077 (1973). In regard to modification of Chapter 43 actions, it is possible to draw at least two inferences from the legislative history: (1) that Congress did not intend the Board to exercise any review over the agency's choice of a sanction; or (2) that Congress intended the Board to review and modify the sanction but under a less intrusive standard and scope of review than that utilized by the Board in reviewing Chapter 75 penalties.

The majority opinion argues that the fact that Congress lowered the evidentiary standard of proof and eliminated the "efficiency of the service" requirement in Chapter 43 actions is persuasive evidence of a Congressional intent to foreclose any and all review by the Board of an agency's choice of a particular Chapter 43 sanction.

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[2] "We cannot avoid what Mr. Justice Cardozo deemed inherent in the problem of construction, making 'a choice between uncertainties. . . .' But to the careful and disinterested eye, the scales will hardly escape appearing to tip sightly on the side of the more probable meaning." Frankfurter, Some Reflections on the Reading of Statutes, *47 Colum. L. Rev.* 527, 544 (1947) (citation omitted).

While the legislative history indicates that Congress wished to simplify and expedite Chapter 43 actions, this fact alone is a tenuous foundation which simply cannot bear the weight of the conclusion reached by the majority, namely, that the Board has no authority to modify in Chapter 43 actions. The majority's conclusion is a quantum leap in logic.

For a number of reasons, it is clear that the statutory construction which is most in harmony with the overall design and purpose of the Reform Act is that Congress intended the Board to review Chapter 43 sanctions but to afford even more deference to the agency's exercise of discretion than the Board does in reviewing Chapter 75 penalties. This conclusion is consistent with the fact that Congress did not expressly or impliedly foreclose the Board's review over any aspect of the agency's Chapter 43 decision: Congress merely provided for a less intrusive review by lowering the evidentiary standard and eliminating the efficiency of the service standard. *See* 5 U.S.C. §§ 4303(e), (f); 7701(c)(1)(A).

The majority opinion relies heavily on the legislative history of Chapter 43 which indicates that Congress carried out a comprehensive review of adverse action procedures, identified a number of problem areas in relation to performance-based actions in particular, and discussed its rationale for amending Chapter 43 to create a separate cause of action for unacceptable performance in § 4303. The majority concludes that Congress would have wanted to foreclose any Board review of Chapter 43 sanctions had Congress expressly considered this issue. This inference is speculative at best. Despite the fact that Congress was presumably aware of the prior practice of the Civil Service Commission in modifying agency penalties,[3]

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[3] *Douglas, supra*, at 326. In *Douglas*, the Board found that the scope of authority which the Commission exercised in mitigating penalties was presumably known to Congress and that there was no

the legislative history is devoid of any suggestion that Congress viewed the Board's review of the agency's sanction in Chapter 43 actions as an unwarranted intrusion on the agency's discretion or that Congress otherwise viewed mitigation as a problem that needed a remedy. Additionally, the legislative history of Chapter 43 indicates that the Civil Service Commission expected that the Board, as well as the courts and arbitrators, would review and modify Chapter 43 sanctions, and there is no indication that Congress disagreed with the Commission's expectation in this regard.[4]

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indication in the Reform Act that Congress intended to alter this authority. *Id.* at 326. The majority opinion attempts to distinguish *Douglas* on the grounds that this presumptive Congressional approval of the Board's authority to mitigate was limited to Chapter 75 actions. I find this distinction unpersuasive. It is fundamentally inconsistent for the Board to find that Congress silently approved of Board mitigation in Chapter 75 actions and to also find that Congress silently disapproved of modification in Chapter 43 actions.

[4] The majority opinion mentions the fact that during the Senate and House hearings, a union and a professional association argued that the proposed standards of review for Chapter 43 actions were defective because there was no provision for the Board to review and modify the agency's sanction. In a written statement submitted at the close of the House hearings, the then Chairman of the Civil Service Commission attempted to respond to some of the criticisms of the bill that had been raised. In commenting on this issue, the Chairman discussed the then proposed "arbitrary and capricious" standard of review in the context of a Chapter 43 action and stated that a "disciplinary action *should* not be overturned because the appeals officer, arbitrator, administrative law judge or the courts deems the penalty to be unduly severe." *Civil Service Reform: Hearings on H.R. 11280 Before the House Committee on Post Office and Civil Service*, 95th Cong., 2d Sess. 831-32 (1978) [Emphasis supplied]. Although the majority finds this statement ambiguous, it is clear from the context that it was made in reference to a Chapter 43 action and that it constitutes a tacit admission by the Commission that Chapter 43 sanctions were an appropriate subject of Board review. The significance of this statement is even more apparent when one considers that the proposed "arbitrary and capricious" standard was subsequently changed to the

Given the absence of any indication in the legislative history that Congress disapproved of the Board's review and modification of agency sanctions, any conclusion that Congress intended to divest the Board of this authority in Chapter 43 actions is clearly unwarranted.[5] Additionally, any such conclusion is squarely at odds with the well-settled principle of statutory construction that cautions against an interpretation that extends the reach of a statute beyond the correction of evils which the statute sought to remedy.[6] 73 Am. Jur. 2d *Statutes* § 157 (1974).

The majority opinion also disregards significant provisions of the Reform Act and, in this regard, the opinion strikes a dissonant chord in the carefully crafted balance which Congress sought to achieve in weighing the need for management discretion and the right of employees to be protected against arbitrary actions. The majority recognizes the fact that Congres had multiple

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"substantial evidence" standard, which the Chairman of the Commission acknowledged was "probably more severe" [from an agency's point of view] than the "arbitrary and capricious" test. *Parker* v. *Defense Logistics Agency*, 1 MSPB 489, 500 n.18.

[5] 5 U.S.C. § 4303(a) provides that: "Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance." The majority opinion finds that this limiting language suggests that Congress intended to preclude the Board's review of the agency's chapter 43 sanction. For the same reasons as discussed above, this finding is unsupported by the legislative history on which the majority relies.

[6] It is evident that in adopting the substantial evidence standard for actions taken under § 4303, Congress wished to preclude the Board and the courts from substituting their judgment for that of the agency's. *See House-Senate Conference on § 2640*, the Civil Service Reform Act of 1978, Mark-Up Session (9/21/78) (Transcript at 39-40). Neither Board mitigation of Chapter 75 penalties, nor modification of Chapter 43 actions under a less intrusive standard for review, would result in the Board's substitution of its judgment for that of the agency's on the appropriateness of the sanction. *See Douglas, supra*, at 328.

purposes in enacting Chapter 43, the primary purpose being to make it easier for agencies to take action against poor performers, but also to protect employee rights and to provide safeguards against arbitrary agency actions. Maj. Op. at 9. However, the majority mistakenly believes that it must choose one purpose to the exclusion of any other in construing Congressional intent. I believe that the above stated purposes are not inconsistent and when considered together evidence the fact that Congress anticipated that the Board would continue to review and modify agency sanctions in performance cases, albeit under a less intrusive standard. In concluding that the primary purpose so greatly outweighs any other purpose as to become the sole indicator of intent, the majority completely ignores Congress' express statement that, while it recognized the tension between employee rights and management flexibility, it viewed civil service reform from the standpoint of the public rather than the more limited perspective of either the employee or the manager. *Senate Report* at 4. Congress further explained that the "rights of employees" to be "removed only on the basis of their competence" and for the "right reasons" are difficult to achieve, but are ultimately "concomitant with the public's need to have its business conducted competently." *Id.* There is no doubt, as the Board found in *Douglas*, that an agency's charges may be adequately supported by evidence of record but the decision may still be arbitrary and capricious because there is no rational connection between the sanction and the agency's reasons for selecting the sanction. *Douglas*, *supra*, at 325. There is no sound basis in administrative law to bifurcate the Board's review of the merits of the agency's charges from the resulting sanction. *See Goodman* v. *United States*, 518 F.2d 505, 510 (5th Cir. 1975) (cited with approval in *Douglas*, *id.*). Thus, it is clear that allowing agencies absolute discretion in selecting Chapter 43 sanctions is inconsistent with Congressional intent to ensure that

employees are removed or retained based solely on "the right reasons." [7] *Senate Report* at 4.

To protect employees against unwarranted actions, Congress included a number of important procedural and substantive safeguards in the Reform Act to ensure "employees' rights to fair treatment" and to ensure that "the employee [is afforded] his due process rights." [8] *Senate Report* at 30, 40.

These safeguards would essentially be meaningless if the Board lacks any authority to review the agency's selection of a Chapter 43 sanction.[9] Although I join the

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[7] Additionally, allowing agencies absolute discretion in selecting Chapter 43 sanctions is inconsistent with our finding in *Douglas* that studies of the Civil Service Commission appellate operations had recommended more, rather than less, frequent exercise of the Commission's mitigation authority, in fairness to both employees and agencies whose disciplinary actions might otherwise be reversed on insubstantial grounds to avoid the imposition of a penalty perceived as too harsh. *Douglas, supra,* at 323. This finding is equally applicable to Chapter 43 actions.

[8] In Chapter 43 actions Congress expressly provided that employees must be afforded an opportunity to demonstrate acceptable performance before the action is taken. 5 U.S.C. § 4202(b)(6); *see also Sandland* v. *General Services Administration*, MSPB Docket No. PH04328310205 (October 22, 1984). Congress also placed a one-year limitation on the performance on which the action could be based; required the agency to identify the specific instances of unacceptable performance in the proposal notice, and required the concurrence of a higher level official in the decision. *See* 5 U.S.C. § 4303(b), (C). In amending § 7701, Congress also expanded employees' statutory appeal rights in a number of important respects. *See Wells* v. *Harris*, 1 MSPB 199, 205 n.18 (1979).

[9] The majority opinion also concludes that the restrictions which Congress placed on performance-based removals of merit pay supervisors serving probationary periods and on employees in the Senior Executive Service (SES) are an indication that these were the only restrictions on the agency's choice of a removal sanction that Congress intended. I find that this evidence is unpersuasive and that it, in fact, suggests a contrary result. Neither super-

majority in the other lead Chapter 43 decisions issued today which, *inter alia*, conclude that the agency may remove an employee under § 4303 based on an absolute performance standard or based on unacceptable performance in a single component of one critical element, I find that the need for the Board to exercise a limited review over the agency's sanction is even more apparent in light of these decisions. *See Callaway* v. *Department of the Army*, MSPB Docket No. PH04328310029 at 9 (October 22, 1984); *Shuman* v. *Department of Treasury*, MSPB Docket No. SE04328410073 at 9 (October 22, 1984).

The Board's Inherent Authority To Modify Chapter 43 Sanctions

In analzying the Reform Act and the Board's decision in *Douglas*, the majority opinion focuses almost exclusively on the legislative history of Chapter 43. In disregarding other relevant provisions of the Reform Act, the majority thus overlooks persuasive indications that the Board's authority to modify agency-imposed sanctions is an inherent part of the powers which Congress granted to the Board in the Reform Act. The Board's authority found in § 7701(a) to hear any appealable case, or to provide for a hearing, is equally applicable to both Chapter 75 and Chapter 43 actions. In interpreting its authority under § 7701(a), the Board has previously noted that this section provides for *de novo* review of both factual and legal questions and has concluded that this provision of *de novo* review includes the authority to

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visors serving probationary periods under § 3321 nor SES employees fall within the coverage of Chapter 43 so Congress' treatment of these two groups can hardly be evidence of any intent with regard to Chapter 43. If anything, these restrictions stand for a Congressional recognition that there are certain situations where removal is an arbitrary sanction *per se* and agencies may not invoke this sanction. This fact suggests that Congress intended the Board to review other performance-based actions where there is an assertion that the sanction is arbitrary.

mitigate penalties. *Douglas* at 316 n.11. Thus, § 7701 provides an independent source of the Board's authority to modify Chapter 43 actions, regardless of any finding that the mitigation authority which the Board inherited from the Commission does not include the authority to modify in such actions.[10] Additionally, the Board's authority in § 1205(a) to "take final action" on any matter within its jurisdiction serves as yet another inherent source for the Board's mitigation authority in both Chapter 75 and Chapter 43 actions. *See Douglas, supra*, at 320-21. In light of the fact that Congress neither expressly nor impliedly foreclosed any aspect of the Board's review of Chapter 43 actions, the conclusion that Congress *sub silentio* divested the Board of the modification authority inherent in these statutory provisions is simply untenable.

Moreover, the majority's position in this regard is impossible to reconcile with the statutory provision for judicial review of the Board's decisions for which Congress expressly provided in 5 U.S.C. § 7703(c). It is a well-settled principle of administrative law that there is no presumption against judicial review and in favor of administrative absolutism unless that purpose is fairly discernible from the statutory scheme. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 90 S.Ct. 827, 35 L.Ed. 2d 184 (1970). *Accord Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S.Ct.

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[10] The majority opinion also overlooks evidence that the Commission did review and mitigate performance-based Chapter 75 actions. *See e.g.*, BN752B60015 (October 7, 1975) (Federal Employee Appeals Authority), agency request for reopening denied, RB752B60250 (January 19, 1976). In that decision, the Commission reversed the removal of a GS-9 Supervisory Nurse, finding that the charges related only to the appellant's supervisory performance and that the removal sanction was unreasonable in light of appellant's eleven years of satisfactory service as a non-supervisory Nurse. The Commission ordered the agency to cancel the action and to place the appellant in a non-supervisory Nurse position at the same or lower grade.

1507, 18 L.Ed. 2d 681 (1967). (Only upon clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review of administrative actions.) The Board has previously held that it is the Board's final decision, not the agency's, that ultimaetly constitutes an adjudication which "must be articulated in a reasoned opinion providing an adequate basis for judicial review." *Parker*, *supra*, at 497. It is for this reason that both the Board and the courts have held that the Board must review the agency's selection of a sanction. *Douglas*, *supra*, at 328; *Otherson* v. *Department of Justice*, 728 F.2d 1513, 1517 (D.C. Cir. 1984) (Gordon, J., dissenting) (the determinations regarding the penalty must be clearly articulated by the agencies and by reviewing authorities or courts will be unable to perform their own review function). There is absolutely no indication in the Reform Act that the selection of a Chapter 43 sanction is either committed to the employing agency's discretion or to the Board's discretion, nor is judicial review of this issue statutorily precluded. Consequently, the conclusion that the sanction is an appropriate subject for judicial review either under § 7703(c) or under the identical standard prescribed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), is inescapable. I find that it is incumbent upon the Board, as an adjudicatory agency whose decisions are subject to judicial review, to review the agency's discretion in selecting the Chapter 43 sanction or remedy.[11]

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[11] The majority opinion also attempts to distinguish the consequences of Chapter 43 actions by asserting that Chapter 43 actions are intended to be remedial in nature rather than to punish employees. While this distinction may be valid in the context of due process considerations, there is no doubt that, however the consequences of Chapter 43 actions are characterized, the results constitute a reviewable exercise of agency discretion. Moreover, as a practical matter, a disabling, if not fatal, stigma attaches to a federal employee who is removed for unacceptable performance. Both public and private sector employers will generally regard such an employee as beyond the pale of employability in the future.

The Appropriate Scope of Review Which the Board Should Exercise in Reviewing Chapter 43 Sanctions

It is neither impossible nor difficult to reconcile Congressional intent to expedite and simplify Chapter 43 actions, on the one hand, with the inherent authority that Congress granted the Board to review both the merits of the agency's charges in Chapter 43 actions and the resulting sanction, on the other hand. Since Congress placed a less burdensome evidentiary standard upon agencies for Chapter 43 actions than for Chapter 75 actions, it is appropriate that the Board apply a less burdensome standard in reviewing the selection of a Chapter 43 sanction. The use of an "abuse of discretion" or an "arbitrary and capricious" standard would provide a less intrusive scope of review.[12] Consistent with Congressional intent to lessen the agency's evidentiary burden in Chapter 43 actions, the Board could also frame this issue in terms of a presumption: That is, in reviewing the agency action, the Board will presume that the agency did not abuse its discretion in selecting the sanction and only in the face of a non-frivolous challenge by the appellant would the agency be required to establish that it did not abuse its discretion in this regard.

In reviewing the penalty in performance-based Chapter 75 actions, the Board has recognized that many of the twelve factors set out in *Douglas* are not relevant for consideration in determining the appropriateness of the sanction.[13] In such cases, the Board has placed major

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[12] In regard to mitigation, the standard of review which the Board articulated in *Douglas* was whether the penalty was "clearly excessive, disproportionate to the sustained charge, or arbitrary, capricious, or unreasonable." *Douglas, supra,* at 313. The Board further stated that in reviewing whether the penalty was "unreasonable," the Board was exercising a scope of review that was considerably broader than an "abuse of discretion" standard. *Id.* at 327.

[13] In another decision issued today, the Board also finds that, with few exceptions, agencies may no longer take performance-

emphasis on whether the agency has adequately supported its judgment that the appellant's performance in the current position makes the appellant unable to perform in a fully satisfactory manner in another position. *See Hatler* v. *Department of the Air Force*, 6 MSPB 605 (1981). Without purporting to be exhaustive, the following is a list of several factors which I believe are relevant in determining the appropriateness of a Chapter 43 sanction:

(1) Whether the sustained charges were based on an absolute performance standard or a component of a critical element or standard.[14]

(2) Employee's past work record, including length of service, past disciplinary record and past performance record; and whether the employee's current position is substantially different from the employee's former positions;

(3) Whether employee's unacceptable performance in his/her current position or in past positions is of such nature that it is not likely that the em-

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based Chapter 75 actions after October 1, 1981. *Gende* v. *Department of Justice*, MSPB Docket No. CH07528410223 at 13-14 (October 22, 1984). Actions involving both performance and nonperformance factors, however, will be reviewed under Chapter 75 standards. *Id.* Thus in actions involving both factors the Board will continue to review the appropriateness of the agency penalty but the Board will not do so in Chapter 43 actions which, by definition, are based solely on unacceptable performance. I find this result fundamentally inconsistent and unsupportable.

[14] Under *Callaway, supra*, the agency will be required to show that it did not abuse its discretion in creating performance standards that involve absolute expectations. Under *Shuman, supra*, in cases where the agency has taken an action based on fewer than all the components of a performance standard for a critical element, the agency must present substantial evidence that the appellant's performance warranted an unacceptable rating on the element as a whole. Hence, it is anticipated that this factor alone will not result in the modification of the agency's sanction.

ployee can perform in a fully satisfactory manner in other positions; [15]

(4) Consistency of agency's choice of a removal or demotion action as compared with the agency's actions taken for same or similar instances of unacceptable performance; [16]

(5) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental or physical impairment, bad faith, harassment, malice or provocation on the part of others involved in the matter.

The above described limited standard and scope of review illustrates one of several ways that the Board could harmonize its inherent authority to review and

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[15] Although a reassignment based on unacceptable performance is not appealable to the Board under § 4303(e), such actions are among the actions Congress identified within the ambit of Chapter 43. *See* 5 U.S.C. § 4302(b)(6). The fact that an action may not be appealable is not dispositive of the issue of whether the Board may utilize that action as a substitution for the original agency sanction in mitigating the sanction. *See e.g., Gonzales* v. *Department of Agriculture*, 7 MSPB 531 (1981) (Board mitigated 28-day suspension to a 5-day suspension, which is not appealable under Chapter 75). Based on these considerations, I find that the Board can modify a Chapter 43 removal or demotion action to a reassignment action, as well as modify a demotion action to a lesser demotion action or a reassignment action.

[16] The Board has consistently recognized that the principle of "like penalties for like offenses" does not require perfect consistency regardless of variations in circumstances or changes in prevailing regulations, standard, or mores. *See, e.g. Douglas, supra* at 333. The Board has held, however, that when an appellant raises an allegation of disparate treatment in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Woody* v. *General Services Administration*, 6 MSPB 410, 411 (1981). Similarly, in Chapter 43 actions, I find that the agency should be required to prove a legitimate reason for a difference in treatment by substantial evidence.

correct arbitrary Chapter 43 sanctions with Congressional intent to provide for a less intrusive review of Chapter 43 actions.

Conclusion

For the foregoing reasons, I find that the Board's authority to review and modify Chapter 43 sanctions is inherent in the powers granted to it by Congress in 5 U.S.C. §§ 1205 and 7701. Additionally, the issue of the agency's choice of a sanction is clearly an appropriate subject for judicial review and it is therefore incumbent on the Board to address this issue in order to provide the courts with a basis to review the Board's decision, pursuant to 5 U.S.C. § 7703(c). There is no persuasive indication in the Reform Act that Congress intended to divest the Board of this inherent authority. In the absence of any express or implicit Congressional intent to proscribe the Board's review of Chapter 43 sanctions, the conclusion that the Board has no such authority is an excessively narrow and ultimately unsupported interpretation of the authority which Congress granted the Board in § 1205 and § 7701. *Cf. Kerr* v. *National Endowments for the Arts*, 726 F.2d 730 (Fed. Cir. 1984) (Board erred in narrowly interpreting its enforcement authority in § 1205).

In the instant case, I am persuaded that the mitigating factors on which the presiding official relied in modifying the sanction are supported by the record and I find that these factors weigh on the side of modification under the abuse of descretion standard discussed above. However, in light of the fact that the parties did not fully address the issue of the agency's sanction in this case, I believe that the Board should remand this case to take further evidence on the relevant factors I have described above and for further findings on the appropriateness of the agency's sanction.

Sept. 22, 1984

Washington, D.C.

/s/ Maria L. Johnson
MARIA L. JOHNSON
Vice-Chair

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

Decision Number: CH04328410250

IN THE MATTER OF:
LEONARD L. LISIECKI

V.

FEDERAL HOME LOAN BANK BOARD

Date: May 29, 1984

INTRODUCTION

By petition filed on January 27, 1984, Leonard L. Lisiecki appealed an action whereby the Federal Home Loan Bank Board, Washington, D.C., removed him from his position as a Savings and Loan Examiner effective January 7, 1984. The agency's action was due to alleged unsatisfactory performance. A hearing was held on this matter on March 28, 1984.

JURISDICTION

A federal employee may appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. 5 U.S.C.A. 7701(a) (West 1980). The appellant has an appeal right under the provisions of 5 U.S.C.A. 4303 (West 1980).

ANALYSIS AND FINDINGS

The agency received approval of its performance appraisal system from the Office of Personnel Management (OPM) on September 23, 1981 (Agency Hearing Exhibit 1). The agency's performance appraisal plan was subsequently implemented throughout the agency (Agency Hearing Exhibit 2). Performance standards developed for the appellant's position as a Savings and Loan Examiner were designed to evaluate his performance in 7 job elements, 3 of which were identified as critical (Agency file at tab 7). The appellant's supervisor evaluated the appellant's performance in April of 1983 and determined that the appellant's performance was unsatisfactory in critical element 6 which required the develepoment of final examination reports on Savings and Loan Associations under review. Thus, the appellant was given a warning of unsatisfactory performance on April 13, 1983 (Agency file at tab 3). The appellant was provided with a "Corrective Action Work Plan" (CAWP) that would be in effect for 180 days (Agency file at tab 4). The appellant was given four assignments during the CAWP period, two as an assistant examiner (Broadview Savings and Loan and Century Federal Savings and Loan) and two as the examiner in charge (First Federal Savings and Loan and Third Federal Savings and Loan). Upon the appellant's completion of the four assignments, the appellant's supervisor determined that the appellant's performance in critical element 6 remained unsatisfactory (Agency file at tab 6).

My review of the evidence of record finds that the appellant was contemporaneously evaluated as having satisfactorily performed critical element 6 on three of the four projects reviewed during the CAWP period. The appellant's supervisor stated in his evaluation report dated October 21, 1983, that in the two projects where the appellant was the examiner in charge, his performance was rated satisfactory. The supervisor suggested how-

ever, that these assignments were more typically given to GS-09 employees whereas the appellant was at the GS-11 grade level. The supervisor's comments on the Third Federal Savings and Loan project found the appellant's performance satisfactory. The only project where the appellant received an unsatisfactory rating was on the Broadview Savings and Loan project where the evaluation of the appellant's performance is "unsatisfactory" for element 6 (the final examination report). *See* Agency file at tab 6 and Agency Hearing Exhibits 5 and 6. The appellant's supervisor and field managers testified that they subsequently detected problems with the appellant's handling of the Third Federal and First Federal projects that support a finding that his performance in critical element 6 was unsatisfactory. I do not find said testimonies credible, however, in light of the contemporaneous detailed evaluations by a field manager that clearly show the appellant performed those projects satisfactorily (Agency File at tab 6 and Agency Hearing Exhibit 5).

With respect to the Broadview Savings and Loan project, where the appellant was rated unsatisfactory in critical element 6, the evidence shows that the appellant was assigned by the examiner in charge to prepare the final examination report on substandard loans. The examiner in charge found that the appellant's final examination report failed to present all problems clearly and concisely, failed to present details in a logical order and understandable manner, failed to include sufficient data to support conclusions and adverse ratings, failed to include correct facts, figures, amounts and ratios, and failed to cross-reference to relevant workpapers in the margins. The examiner in charge for this project testified that after the appellant was told to rewrite the report and include additional information that was available concerning substandard loans, the appellant again prepared a superficial report that failed to include all of the critical information. The examiner in charge and two of his assistants had to rewrite the report, according to the

examiner in charge. He further testified that the appellant apologized to him for the poor quality of the appellant's report.

The appellant defended against his unsatisfactory rating on the Broadview project by testifying that he did not have all the data necessary to complete the report. I do not find this defense persuasive in light of the examiner's testimony that the updated loan files were made available to the appellant and that the appellant spent considerable time reviewing them. The appellant also defended against the unsatisfactory rating by producing evidence showing that his supervisor and the examiner in charge of the Broadview project did not comply with all of the requirements listed in his CAWP. Specfiically, he presented unrebutted evidence that the examiner and his supervisor did not meet with him in accordance with the schedule outlined in the CAWP. I do not find this defense persuasive in light of the appellant's testimony that he did not believe he needed any supervisory assistance in completing the assignment. Therefore, I find that the agency has supported by substantial evidence, its charge that the appellant unsatisfactorily performed the Broadview Project. I further find that substantial evidence supports the agency's rating of the appellant's performance as unsatisfactory in critical element 6 based on its performance review of April, 1983, which found the appellant's performance satisfactory on 4 of 10 projects assigned since April of 1982, and its October, 1983 review that found the appellant's performance unsatisfactory on 1 of 4 projects completed during the CAWP period (Agency File at tab 6).

In addition to defending against the agency's charge of unsatisfactory performance, the appellant also alleged that the agency took this action in reprisal for his having exposed waste and fraud within the agency in 1978. I interpret the appellant's allegation as a claim that the agency committed a prohibited personnel practice in vio-

lation of 5 U.S.C. 2302(B)(8)(A)(ii). To establish a prohibited personnel practice, the appellant must show that he engaged in a protected activity, that he was subsequently treated in an adverse fashion by his employer, and that there is causal connection betwen the protected activity and the adverse action. *In re Frazier*, 1 MSPB 159 (1979), *aff'd* 672 F.2d 150 (D.C.Cir. 1982).

I find that the evidence of record establishes that the appellant reported acts of waste and fraud on the part of agency employees to higher level management officials in 1978. The instant action was subsequently taken and was adverse to the appellant. The appellant has failed to show, however, that there is any causal connection between his protected activity and the instant action. The appellant testified that his protected activity occurred in 1978 when he was assigned to the Tennessee District and that it concerned activities of agency employees stationed in Texas. The appellant also testified that he has no knowledge of whether any managers or supervisors in the Cincinnati District knew of his protected activities. Further, the agency managers and supervisors involved in this action all testified that they had no specific knowledge of the appellant's protected activity that occurred in 1978. Moreover, I have found that the agency's determination that the appellant performed unsatisfactorily was supported by substantial evidence. Therefore, I find that the appellant has failed to carry his burden of showing that the agency engaged in a prohibited personnel practice by taking this action.

The remaining issue concerns whether the agency's decision to remove the appellant was reasonable under the facts and circumstances of this case. The statutory provision found at 5 U.S.C. 4302 envisions that an agency will consider reassigning and/or demoting an employee prior to removing him for unacceptable performance. The deciding official testified that he considered a lesser action but in his opinion the appellant should be in an-

other field of business because writing the final examination report, the element the appellant performed unsatisfactorily, is the most important part of the Savings and Loan Examiner's job.

I have considered whether the agency's removal action was reasonable in accordance with the Board's authority to review penalties discussed in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). The Board's responsibility to assure that managerial judgement has been properly exercised within tolerable limits of reasonableness was extended to Chapter 43 cases in *Frisby v. Department of the Tresury*, 10 MSPB 11, 13 (1982). I find that the agency exceeded the tolerable limits of reasonableness in removing rather than demoting the appellant in light of the following mitigating circumstances: (1) the appellant performed satisfactorily as a Savings and Loan Examiner for over ten years prior to April of 1983, receiving promotions from 7 to 11 grade levels during that period; (2) the evidence shows that during his CAWP period from April to October of 1983, the appellant was rated as unsatisfactory on job element 6 only on the first of four projects he was assigned; (3) the appellant's supervisor noted in his October 21, 1983 memorandum that the appellant was able to perform satisfactorily on the two projects at the GS-09 level wherein he served as the examiner in charge; and (4) the appellant performed all other elements of his job satisfactorily. Therefore, I find that a demotion to a GS-09 level Savings and Loan Examiner position is the most severe action the agency can reasonably take in this case.

DECISION

The agency's removal action is reversed. The agency is hereby ordered and directed to cancel the removal action and substitute an action reducing the appellant in grade to the position of Savings and Loan Examiner, GS-09. The agency is further ordered to furnish to the Chicago

Regional Office of the Board a copy of the personnel action form documenting the above corrective action not later than twenty (20) days after this decision becomes final.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on July 3, 1984 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

ADMINISTRATIVE AND JUDICIAL REVIEW

Any party to this appeal, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. An original and three copies of any petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 no later than the date cited above.

The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations. The Board may grant an petition for review when a party submits written argument and supporting documentation which tend to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. Section 7703(b)(1), as modified by Section 127 of the Federal Court Improvement Act of 1982 (to be codified at 28 U.S.C. Section 1295(a)(9)), the appellant has the right to seek judicial review of the Board's *final* decision on this appeal. A petition request-

ing such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be *received* by the court within 30 days of the final Board decision.

Any party seeking enforcement of a final decision of the Board may file a petition for enforcement with the regional office that rendered the initial decision. Such petition should be directed to the Regional Director and must comply with the requirements of 5 C.F.R. 1201.181 (a).

For the Board:

/s/ Victor W. Russell
VICTOR W. RUSSELL
Presiding Official

APPENDIX D

FOR THE FEDERAL CIRCUIT
UNITED STATES COURT OF APPEALS

No. 85-899

CH04328410250

LEONARD L. LISIESKI,
Petitioner,

v.

FEDERAL HOME LOAN BANK BOARD,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

Dated August 20, 1985

ENTERED BY ORDER OF THE COURT
FRANCIS X. GINDHART, Clerk

/s/ Francis X. Gindhart,
Clerk

Issued As a Mandate: November 22, 1985

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 85-899

LEONARD L. LISIESKI,
Petitioner,

vs.

FEDERAL HOME LOAN BANK BOARD,
Respondent.

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

September 20, 1985
Date

APPENDIX F

5 U.S.C. § 3321 (1982):

§ 3321. Competitive service; probationary period

* * * * *

(b) An individual—

(1) who has been transferred, assigned, or promoted from a position to a supervisory or managerial position, and

(2) who does not satisfactorily complete the probationary period under subsection (a)(2) of this section,

shall be returned to a position of no lower grade and pay than the position from which the individual was transferred, assigned, or promoted. Nothing in this section prohibits an agency from taking an action against an individual serving a probationary period under subsection (a)(2) of this section for cause unrelated to supervisory or managerial performance.

5 U.S.C. § 3594 (1982), *as amended* by Pub. L. 98-615, Title III, § 303(b), 98 Stat. 3217 (1984):

§ 3594. Guaranteed placement in other personnel systems

(a) A career appointee who was appointed from a civil service position held under a career or career-conditional appointment (or an appointment of equivalent tenure, as determined by the Office of Personnel Management) and who, for reasons other than misconduct, neglect of duty, or malfeasance, is removed from the Senior Executive Service during the probationary period under section 3393(d) of this title, shall be entitled to be placed in a civil service position (other than a Senior Executive Service position) in any agency.

(b) A career appointee who has completed the probationary period under section 3393(d) of this title, and who—

(1) is removed from the Senior Executive Service for less than fully successful executive performance as determined under subchapter II of chapter 43 of this title; or

(2) is removed from the Senior Executive Service under paragraph (4) or (5) of section 3595(b) of this title;

shall be entitled to be placed in a civil service position (other than a Senior Executive Service position) in any agency.

(c)(1) For purposes of subsections (a) and (b) of this section—

(A) the position in which any career appointee is placed under such subsections shall be a continuing position at GS-15 or above of the General Schedule, or an equivalent position, and, in the case of a career appointee referred to in subsection (a) of this section, the career appointee shall be entitled to an appointment of a tenure equivalent to the tenure of the appointment held in the position from which the career appointee was appointed;

(B) any career appointee placed under subsection (a) or (b) of this section shall be entitled to receive basic pay at the highest of—

(i) the rate of basic pay in effect for the position in which placed;

(ii) the rate of basic pay in effect at the time of the placement for the position the career appointee held in the civil service immediately before being appointed to the Senior Executive Service, or

(iii) the rate of basic pay in effect for the career appointee immediately before being placed under subsection (a) or (b) of this section; and

(C) the placement of any career appointee under subsection (a) or (b) of this section may not be made to a position which would cause the separation or reduction in grade of any other employee.

(2) An employee who is receiving basic pay under paragraph (1) (B) (ii) or (iii) of this subsection is entitled to have the basic pay rate of the employee increased by 50 percent of the amount of each increase in the maximum rate of basic pay for the grade of the position in which the employee is placed under subsection (a) or (b) of this section until the rate is equal to the rate in effect under paragraph (1) (B) (i) of this subsection for the position in which the employee is placed.

5 U.S.C. Chapter 43, Subchapter I (1982), *as amended by* Pub. L. 98-615, Title II, § 202, 98 Stat. 3214 (1984) [5 U.S.C. § 4301-§ 4305]:

CHAPTER 43—PERFORMANCE APPRAISAL

SUBCHAPTER I—GENERAL PROVISIONS

§ 4301. Definitions

For the purpose of this subchapter—

(1) "agency" means—

(A) an Executive agency;

(B) the Administrative Office of the United States Courts; and

(C) the Government Printing Office;

but does not include—

(i) a Government corporation;

(ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office;

(2) "employee" means an individual employed in or under an agency, but does not include—

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans' Administration whose pay is fixed under chapter 73 of title 38;

(D) an administrative law judge appointed under section 3105 of this title;

(E) an individual in the Senior Executive Service;

(F) an individual appointed by the President; or

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; and

(3) "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

§ 4302. Establishment of performance appraisal systems

(a) Each agency shall develop one or more performance appraisal systems which—

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

§ 4302a. Establishment of performance appraisal systems for performance management and recognition system employees

(a) Each agency shall develop one or more performance appraisal systems for employees covered by chapter 54 of this title which—

(1) provide for periodic appraisals of job performance of such employees;

(2) require the joint participation of the supervising official and the employee in developing performance standards with authority for establishing standards resting with the supervising official; and

(3) use the results of performance appraisals as a basis—

(A) for adjusting the base pay and making performance award decisions with respect to any such employee in accordance with the applicable provisions of such chapter 54; and

(B) for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing any such employee.

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system under this section shall provide for—

(1) five levels of summary performance ratings as follows:

(A) two levels which are above the fully successful level;

(B) a fully successful level; and

(C) two levels which are below the fully successful level;

(2) establishing, in writing, the critical elements of each employee's position and the performance standards for the fully successful level for each such element which will, to the maximum extent feasible, permit accurate evaluation of job performance on the basis of objective criteria related to the job in question;

(3) communicating, at the beginning of each appraisal period and in writing, to each employee who is covered by chapter 54 of this title the performance standards and critical elements of the employee's position;

(4) evaluating each such employee during the appraisal period on the basis of such standards;

(5) assisting any such employee in improving performance rated at a level below the fully successful level; and

(6) reassigning, reducing in grade, or removing any employee who continues to perform at the level which is 2 levels below the fully successful level, after such employee has been provided with written notice of such employee's rating and afforded reasonable opportunity to raise such employee's level of performance to the fully successful level or higher.

(c)(1) Appraisals of performance under this section—

(A) shall take into account individual performance and may take into account organizational accomplishment;

(B) shall be based on factors such as—

(i) any improvement in efficiency, productivity, and quality of work or service, including any significant reduction in paperwork;

(ii) cost efficiency;

(iii) timeliness of performance;

(iv) other indications of the effectiveness, productivity, and quality of performance of the employees for whom the employee is responsible; and

(v) meeting affirmative action goals and achievement of equal employment opportunity requirements;

(C) may be reviewed by an employee of the agency in accordance with procedures established by the Office of Personnel Management;

(D) shall, on request of the employee whose performance is appraised, by reconsidered by an employee of the agency in accordance with procedures established by the Office; and

(E) may not be appealed outside the agency.

(2) Reconsideration of an appraisal under paragraph (1)(D) of this subsection may be made only by an employee who is in a higher position in the agency than each employee who made, reviewed, or approved the appraisal.

(d)(1) In order to promote the purposes of this section, there shall be established within each agency a performance standards review board (hereinafter in this subsection referred to as the "board"), consisting of at least six members, all of whom shall be chosen by the agency head from individuals employed in or under such agency. Of the members, at least one-half shall be

employees who are covered by chapter 54 of this title and who are in the competitive service. A board shall be chaired by the member of the board designated for that purpose by the agency head.

(2) It shall be the function of each board—

(A) to assess, by the use of representative sampling techniques, the appropriateness of performance standards developed and used by the agency under this section;

(B) to study the feasibility of an awards program based on the collective performance of units or other groups of employees who are covered by chapter 54 of this title, and to submit as part of its annual report under paragraph (3) of this subsection recommendations for any actions which the board considers appropriate with respect to any such program; and

(C) to provide technical assistance with respect to any demonstration projects which may relate to performance standards of the agency under this section.

(3) A board shall report to the head of the agency on its activities under this subsection annually.

(e) In carrying out this section, neither the Office nor any other agency may prescribe a distribution of levels of performance ratings for employees covered by chapter 54 of this title.

(f) The Office may not prescribe, or require an agency to prescribe, any specific performance standard or element for purposes of this section.

(g) This section and any regulations prescribed under this section shall cease to be effective as of the date on which chapter 54 of this title ceases to be effective.

§ 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for

more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title.

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

§ 4304. Responsibilities of the Office of Personnel Management

(a) The Office of Personnel Management shall make technical assistance available to agencies in the development of performance appraisal systems.

(b)(1) The Office shall review each performance appraisal system developed by any agency under this section and determine whether the performance appraisal system meets the requirements of this subchapter.

(2) The Comptroller General shall from time to time review on a selected basis performance appraisal systems established under this subchapter to determine the extent to which any such system meets the requirements of this subchapter and shall periodically report its findings to the Office and to the Congress.

(3) If the Office determines that a system does not meet the requirements of this subchapter (including regulations prescribed under section 4305), the Office shall direct the agency to implement an appropriate system or to correct operations under the system, and any such agency shall take any action so required.

§ 4305. Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter.

5 U.S.C. Chapter 75 (1982) [5 U.S.C. § 7511-§ 7514]:

Chapter 75—ADVERSE ACTIONS

SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

§ 7511. Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United Stats Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

(2) "suspension" has the meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.

§ 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such

reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

§ 7514. Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter, except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations.

5 U.S.C. § 7701 (1982):

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee

experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision

would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this

section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i) (1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding calendar year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) The Board may prescribe regulations to carry out the purpose of this section.

5 U.S.C. § 7703 (1982):

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.